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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*
v.
LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals is reported at 527 F.2d 33 (8th Cir., 1975), and reproduced at pages 246-266 of the Appendix. The memorandum and order of the district court is reported at 375 F. Supp. 879 (W.D. Mo., 1974), and reproduced at pages 218-245 of the Appendix.

JURISDICTION

The opinion of the court of appeals was entered on December 16, 1975. A timely petition for writ of certiorari was granted by this Court on November 15, 1976.[1] By letter dated December 16, 1976, the Clerk of this Court extended the time within which petitioners' briefs in this case and in No. 75-1126 must be filed to and including January 15, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the statutory prohibition against discrimination on account of religion, imposed on employers and unions by Sections 701(j) and 703 of Title VII of the Civil Rights Act of 1964, as amended, may, consistent with the purposes and intent of Title VII and with the constraints of the Establishment Clause of the First Amendment, be construed to require the parties to a collective bargaining agreement to accord special privileges to Sabbatarians and others because of their religion which deprive contract beneficiaries of non-discriminatory seniority and other rights guaranteed by the agreement.

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, provides in pertinent part as follows:

Sec. 701. For the purposes of this title . . .

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

[1] On the same day the Court granted the petition of Trans World Airlines in No. 75-1126, a companion to this case, and ordered the cases consolidated.

is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

. . .

Sec. 703. (a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ;

. . .

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or expel from membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ;

(2) to limit, segregate, or classify its membership . . . or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . religion . . . .

. . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . , provided that such differences are not the result of an intention to discriminate because of . . . religion . . . .

. . .

(j) Nothing contained in this title shall be interpreted to require any employer [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the . . . religion . . . of such individual or group on account

> of an imbalance which may exist with respect to the total number or percentage of persons of any . . . religion . . . employed by any employer [or] admitted to membership or classified by any labor organization . . . in comparison with the total number or percentage of persons of such . . . religion . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The Guidelines of the Equal Employment Opportunity Commission with respect to religious discrimination, 29 C.F.R. § 1605.1, provide in pertinent part as follows:

> . . .
>
> (b) The Commission believes that . . . section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business.
>
> (c) . . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

STATEMENT OF THE CASE

1. Background

Respondent Larry G. Hardison, plaintiff in the district court, was employed by Trans World Airlines (TWA) on June 5, 1967 as a Stores Clerk in Building No. 1 at TWA's Kansas City Overhaul Base, Kansas City (Missouri) International Airport (A. 22, 23).[2]

[2] References are to the Appendix filed with the Court. Where appropriate, references to findings of fact made by the district court appear first, and are set off by semicolon from references to the record evidence which support them.

He was terminated by TWA, in the action from which this suit arises, on April 2, 1969 (A. 22).

TWA's Kansas City Overhaul Base is the Company's principal aircraft maintenance facility, with all airframe and engine overhaul and major maintenance work on TWA's aircraft being performed there, along with similar maintenance which TWA performs under contract with approximately thirty other airlines (A. 23, 59). To meet these obligations the Kansas City Overhaul Base operates on a round-the-clock, seven-days-a-week schedule year round (A. 23, 116).

At the time Hardison was employed by TWA and at all times pertinent to this action, the nonsupervisory mechanics and related employees at the Kansas City Overhaul Base, including Hardison, were represented for collective bargaining purposes by Local Lodge 1650 and District Lodge 142 of the International Association of Machinists and Aerospace Workers, AFL-CIO (A. 22, 25-27). Throughout the entire period pertinent to this action, the terms and conditions of employment for persons employed in the bargaining unit into which Hardison was hired were those specified in a collective bargaining agreement entered into between TWA and the IAM&AW petitioners[3] and dated August 25, 1966 (A. 22, 210-218). That contract, discussed in greater detail *infra* (pp. 8-10, 26-29), in general required that, among bargaining unit employees, "all reductions or increases in force, preference of

[3] Distinctions between the role and responsibilities of Local Lodge 1650, District Lodge 142, and the parent body, the International Association of Machinists and Aerospace Workers, AFL-CIO, are immaterial to the issues under review here. For convenience, the petitioner Unions are hereafter referred to collectively as "the Union."

shift assignment, vacation period selection, . . . bidding for vacancies or new jobs, and . . . all promotions, demotions, or transfers involving classifications covered by this Agreement," were to be made in order of seniority (A. 214).

At the time Hardison applied for employment with TWA, he indicated on his application that he would be willing to work "shifts, including weekend" (A. 25), and until September or October of 1968, Hardison did, in fact, work on Saturdays when required (A. 73-74). He worked, at various times, on both the twilight shift (3:30 p.m. to 11:00 p.m.), and the graveyard shift (11:00 p.m. to 7:00 a.m.) (A. 66-67).

2. Circumstances Leading to Hardison's Discharge

In the spring of 1968, Hardison began to study the teachings of the Worldwide Church of God (A. 66), one of which requires honoring the Sabbath, observed from sunset Friday to sunset on Saturday (A. 67), by refraining from the performance of any work during that time. By September or October of 1968 (A. 72-74), Hardison had decided to accept and follow the teachings of the Worldwide Church of God, and thereafter he was no longer willing to work on the Sabbath, or on the religious holidays observed by his Church.[4] Hardison initially was able to accommodate his religious beliefs to the demands of his job by exercising his

[4] Seven such holidays are observed throughout the year, none of which occur on fixed calendar dates (A. 25). TWA was prepared to permit Hardison to miss work on his religious holidays, provided he was willing to work on the contractually specified holidays (A. 120, 137-138). The Union was amenable to this arrangement, since it would not have required violation of any provision of the contract (A. 59, 138). The controversy giving rise to this suit did not involve a holiday observance however (A. 124).

accumulated seniority right to bid for a shift assignment compatible with his religious obligation to refrain from Sabbath work. Thus in early October, 1968, Hardison bid for and was assigned to a Sunday through Thursday graveyard shift in the Building 1 Stores Stock Room. In this assignment, his five-day week started at 11:30 p.m. on Sunday and ended at 7:00 a.m. on Friday (A. 29, 66). In December of 1968, however, Hardison again exercised his contractual seniority right to bid for and receive a new assignment, this time to the day shift in a different area (Stores Progress Section in Building 2) (A. 67-68). That move, from the Stores Stock Room Section in Building 1 to the Stores Progress Section in Building 2, put Hardison into a different seniority group in which he became the second most junior person in relative seniority standing (A. 229; 74-75). Hardison's new assignment—to the day shift Monday through Friday—still enabled him to reconcile his work schedule with his religious obligations, since his work week now ended at 3:30 p.m. on Friday (A. 68). His relatively low seniority standing in Building 2, however, made Hardison more vulnerable to being involuntarily rescheduled to cover for other employees' authorized absences than he had been previously (A. 227; 75-76), as he recognized (A. 103-105).

Three months after he transferred to the Building 2 day shift, Hardison found himself in exactly that situation. In early March, 1969, the only man who was junior to Hardison on that seniority roster went on vacation, and under the established contractual seniority and shift assignment rules Hardison would have been obliged to take the junior man's place for the duration of his vacation (A. 60). Inasmuch as the junior man's work assignment was Thursday through

Monday on the day shift, Hardison would have been required to work during the day on Saturday, a requirement he found offensive to his religious beliefs (A. 68).

During the period in 1968 when Hardison first began to study the teachings of the Worldwide Church of God, he had made his supervisors aware of the potential conflict between his job schedule and the beliefs of that church (A. 27-31, 117-124). Consequently, when the vacation rescheduling arose in March of 1969, TWA's Manager of Stores Systems at the Kansas City Overhaul Base, Mr. Everett Kussmann, realized that the proposed vacation schedule would create a problem for Hardison. Shortly before the first Saturday on which Hardison was scheduled to work, Kussmann met with Hardison and James Tinder, a representative of Local Lodge 1650, IAM&AW (A. 229; 31, 126). At that meeting, the purpose of which, according to Kussmann, was "to make sure that we had no misunderstanding" about what Hardison's obligations were (A. 126), the three men discussed possible ways by which Hardison might avoid having to meet his pending Saturday shift assignment. Kussmann on that occasion suggested that Hardison's religious needs might be met "by [Hardison] exchanging with an employee within the section or seniority grouping" (A. 127) or that Hardison "might be able to . . . exchange with someone in another seniority grouping" (A. 127). Both of those expedients would have implicated the contractual seniority system. The Union at the time was willing to permit Hardison to move to any assignment or shift which would not require work on Friday night or Saturday, provided the assignment was put up for bid and Hardison was the senior employee to bid into it (A. 83-85,

126-128). The Union was "totally agreeable to any adjustment that could be made for [Hardison] as long as it didn't deprive another employee of . . . seniority rights" (A. 91). After exploring all possible alternatives, the Union official attending the meeting concluded that there were none which would not violate the contract rights of other employees (A. 229; 77, 84, 91-92).

Hardison himself had two suggestions. First, he was willing simply to skip his Saturday assignments, with an appropriate reduction in his pay. That option was unacceptable to the Company (A. 229; 127-128) because, as Mr. Kussmann testified, Hardison's job would have to be filled, either by assigning a man from another section, thus leaving another function unperformed, or by having someone from another shift work overtime. This latter solution was thought unreliable because, under the contract, overtime work cannot be compelled except in an emergency situation (A. 127-128). Second, Hardison claimed to know of a person then assigned to the "graveyard" shift who was unhappy with that assignment. He proposed that a simple swap of shift assignments between himself and the "graveyard" employee be arranged, but again, the Union was willing to acquiesce in such an arrangement only if Hardison's seniority had been sufficient to entitle him to "bump" into it (A. 83-84). Otherwise the "swap" would adversely affect the seniority right of persons senior to the would-be transferee who held assignments which would not advantage Hardison (A. 84-85). In fact, however, there was no job up for bid in early March to which Hardison might have transferred (A. 229; 92-93). And even if there had been a vacancy in a job which would have alleviated Hardison's problem, he

could not have been assigned to it without depriving "a more senior employee * * * of his seniority rights" (A. 84-85, 91-92).

The meeting thus ended without success; no method could be found for relieving Hardison of his Saturday assignment which would not (1) require TWA to operate with either Hardison's job or some other job being unperformed on Saturday, or (2) require some other employee to give up either a department or shift assignment, or the right to refuse overtime work, which the collective bargaining agreement guaranteed him (A. 96).[5] Hardison nevertheless declined to work his scheduled shift for three successive Saturdays, March 8, 15, and 22, 1969 (A. 31, 77-78), and was terminated by TWA for those absences. By the time of the Company hearing at which the formal decision to terminate Hardison was made, the problem which had begun as a temporary, vacation schedule problem, had become permanent by virtue of Hardison's voluntary transfer to a twilight shift and his refusal to work his full scheduled Friday shift on March 28 (A. 230; 170-171). This lawsuit followed.

3. Proceedings Below

Hardison, having first invoked the administrative remedy provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, brought this action in the district court on February 10, 1972, asserting jurisdiction under Section 706 of Title VII, 42 U.S.C.

[5] It is undisputed that Hardison's predicament was in no way—either direct or remote—the result of any intention on the part of Company or Union to discriminate against him on account of his religion, or of any past conduct undertaken with such purpose or having such effect (A. 227; 41-42, 97, 128).

§ 2000e-5. He charged both TWA and the Unions with violating rights granted him by Title VII, alleging in substance that his discharge by TWA constituted discrimination on account of his religion, and charging in his complaint that the Unions "cooperated, acted in concert, and assisted" (A. 4-5) TWA in that action, all in violation of Title VII of the Civil Rights Act of 1964.[6]

After a trial in which much of the factual record was stipulated, the district court ruled that Sections 703 (a) and (c) of Title VII, 42 U.S.C. § 2000e-2(a) and (c), and valid Regulations of the Equal Employment Opportunity Commission interpreting the statute required both employers and unions to make "reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1. The court further ruled, however, that, on the facts of this case, both the Union and TWA had satisfied the legal obligations owed Hardison, and ordered entry of judgment for all defendants.

Specifically, the court characterized Hardison's claim against the Union as an assertion "that the union dis-

[6] Prior to March 24, 1972, Title VII did not define the term "religion" as used in Section 703. The Equal Employment Opportunity Commission had, in 1966 and again in 1967, issued Guidelines purporting to define the statutory prohibition on religious discrimination. The 1967 Guidelines, appearing at 29 C.F.R. § 1605.1 (p. 4, *supra*), were found by both the district court and the court of appeals to be applicable in this case. The Equal Employment Opportunity Act of 1972 added what is now Section 701(j), 42 U.S.C. § 2000e(j) to Title VII, substantially incorporating the language of 29 C.F.R. § 1605.1 into the Act's definition of religion.

criminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath" (A. 222-223). The court thus saw the question posed as "whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case" (A. 224). In an analysis which, while not so denominated, drew heavily on First Amendment principles (see II, *infra,* pp. 48-79), the court concluded that to read the applicable EEOC guidelines as requiring "the employer in every case to shift an employee out of seniority to accommodate religious beliefs[]" would constitute the imposition of " 'a priority of the religious over the secular' (A. 226) . . .[7] and would perhaps raise constitutional questions [citation omitted]" (A. 226). The court concluded from this analysis that "it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the . . . contract" (A. 226).

The court believed this conclusion was buttressed by the protection Congress had provided in Section 703(h) of Title VII for "bona fide seniority systems," see 42 U.S.C. § 2000e-2(h). The court observed that, as consistently interpreted by appellate courts, Section 703(h) does not protect a seniority system which "perpetuates the consequences of past discrimination. In

[7] Quoting from Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, 628 (1971).

other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination" (A. 227). The court found no contention, however, and no record basis on which a contention might have been supported, "that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" (A. 227). To summarize, the district court found no evidence that the collectively bargained seniority system which governed job and shift assignment, and selection of days off, in Hardison's bargaining unit operated in any way to perpetuate any employment disability suffered by Hardison as a result of past discrimination against him on account of his religion. The court further found that, absent any such perpetuating effect linked to previous invidious discrimination, the contractual seniority system was protected by Section 703(h), and that any interpretation of the applicable guidelines which required invasion of that protection, for the sole purpose of facilitating Hardison's practice of his religion, would be of questionable constitutional validity. Thus, construing the guidelines in a way which would *not* require abrogation of contractual seniority rights, the court found that the Unions had satisfied the obligation imposed on them and dismissed the complaint as to them (A. 228-232).

With respect to TWA, the court alluded to the various efforts made by management representatives to satisfy Hardison's needs. The court concluded that TWA had done all it reasonably could have, short of

either "simply allow[ing] plaintiff to take his time off and attempt[ing] to replace him, or . . . forc[ing] another employee to change shifts" (A. 243-244). Again drawing implicitly on First Amendment principles, the court held that the first of these options was not required by the Act and Regulations because "Title VII cannot be interpreted to require that companies finance employees' religious beliefs" (A. 244), and that the second was not required because "Title VII does not force TWA to impose upon other employees because of one employee's religious belief" (A. 244). On this analysis, the court ruled that TWA had satisfied its duty under the Act, and dismissed the claim against the company.

The court of appeals reversed the judgment in favor of TWA. Recognizing that the case had been tried "on primarily stipulated facts" (A. 250) and that the "factual background of [the] litigation is not disputed" (A. 247), and "rely[ing] heavily upon the findings of the District Court" (A. 247), the court nevertheless rejected the district court's conclusion "that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business" (A. 256). The court reached this result by identifying several "alternatives" which it found to have been available to TWA "[w]ithin the framework of the collective bargaining agreement . . ." (A. 256). Among these, in the court's view, was the option to permit Hardison to work a four-day week. The court held that TWA would have been obligated to exercise this option even though to do so might have required utilization of a supervisor or transferring another worker on duty elsewhere to fill Hardi-

son's slot, and even though such transfer might have "cause[d] some other shop function to suffer" (A. 256). Alternatively, the court found that, "within the framework of the collective bargaining agreement" TWA could have filled Hardison's Sabbath shift "from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). That this would require TWA to pay overtime was held immaterial. "The [EEOC] regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation" (A. 258). Concluding that TWA was required to, but had not, considered these alternatives, the court held that TWA's "burden of proof has [not] been met in this case" (A. 259).

Finally, the court of appeals rejected TWA's challenge to the constitutionality of the statute. However, while purporting to "agree with the District Court's conclusion" in this respect (A. 266), the court failed to recognize that the district court's conclusion was necessarily based on its own construction of the statute and Guidelines, a construction which the court of appeals rejected.

On the ground that the conclusions which led the district court to dismiss as to the Union "are not directly challenged upon appeal" (A. 263), the court of appeals affirmed entry of judgment in its favor (A. 266). But it made clear its position that (A. 260), "a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is *prima facie* evidence of union and employer culpability under the Act."

SUMMARY OF ARGUMENT

I. Title VII does not require the sacrifice of seniority and other employee rights by those who are non-Sabbatarians to facilitate religious observances of Sabbatarians. The court of appeals' contrary conclusion is refuted by the language and legislative history of Title VII, standing alone, and even if the question were closer than it is, that conclusion would have to be rejected because reading Title VII to create a preference for one employee over others on the basis of the former's religious beliefs and practices would require that the Act be declared unconstitutional under the First Amendment. Accordingly, there "comes into play [the canon of construction] that when a statute is ambiguous 'construction should go in the direction of constitutional policy.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974).

If a company requires the services of employees on Saturday, some of its employees will have to work that day. If that assignment is considered undesirable, the employer, or if the employees are represented by a union, the collective agreement, will have to state the method for determining who shall be required to fill that undesired assignment.

The point of Title VII is that the assignment rule used, in form and in operation, must provide all employees, regardless of their race, color, religion, sex or national origin the same chance to avoid this undesirable work. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1971). We can see no escape from the logic of the proposition that requiring

individuals who do not espouse any religion, or a religion that does not regard Saturday as the Sabbath, to do all the undesired Saturday work, and excepting individuals who do espouse a Sabbatarian religion from that undesired work, is the very "discriminatory preference for * * * [a] minority * * * group" which § 703 in terms prohibits.

Griggs is the only Title VII decision of this Court cited by the court below. But whatever the limits of *Griggs'* so-called "effects" test may eventually prove to be (see *General Electric Co.* v. *Gilbert,* — U.S. —, 45 L.W. 4031, 4034), the first limiting principle on the doctrine there announced is apparent from the decision itself. Consistent with Title VII's prohibition of both discrimination against and preferences for any group, *Griggs'* holding does not sanction an advantage for minorities because of their status as such, nor does it impose a detriment on the majority *qua* majority. Rather, the Court emphasized that "the Act does not command that any person be hired simply because * * * he is a member of a minority group." *Id.,* at 430-431.

Here, of course, the Court of Appeals did not conclude that Sabbatarians were denied an equal opportunity to avoid Saturday work; instead, it read Title VII to mandate rules that exempt Sabbatarians from all Saturday work and require only non-Sabbatarians to work on Saturday. It thereby deprived senior non-Sabbatarians of the right they earned by their past labor to choose whether or not they wish to work on Saturday. That result is precisely contrary to the equal opportunity purpose of Title VII, as stated in the Act itself, and as implemented by this Court in *Griggs.* For, to exempt Sabbatarians from Saturday work is to ignore the lesson of *Griggs* that the statutory prohibition against discrimination forbids giving

any advantage to any individual "because of such individual's race, color, religion, sex or national origin."

In interpreting § 703 of the 1964 Act as requiring TWA to give preference to Hardison's desire not to work on Saturday over the same desire of senior employees whose motivation was not religious, the court of appeals misread the 1967 EEOC Guidelines and misconstrued what Congress did in 1972 in adding § 701(j) to the Act. The 1967 EEOC Guidelines do not in terms impose such a requirement and there is no evidence that such an obligation was in the contemplation of the 1972 Congress which added § 701(j) to the Act.

The EEOC's first Religious Discrimination Guidelines, issued June 15, 1966, required employers to accommodate the reasonable religious needs of employees. In one of several examples illustrating the scope of that requirement, those Guidelines expressly provided that "an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees." These Guidelines were replaced on July 10, 1967. The 1967 Guidelines do not in terms require that the desires of the Sabbatarians be permitted to override those of other employees. Nor do the changes in the 1966 regulation call for such an interpretation. By elevating the standard by which the employer's failure to accommodate will be justified (from "serious inconvenience" to "undue hardship"), and by shifting the burden of proof with respect to justification to the employer, the 1967 Guidelines undoubtedly increased the number of cases in which an employee would be able to make out a case of discrimination, but neither change

even suggests that a preference among employees was contemplated. Nor can elimination of the illustrative example respecting the impact on other employees lead to any inference, because the 1967 Guidelines eliminated *all* the illustrative examples in the 1966 Guidelines, including illustrations of unlawful conduct which the change clearly was not intended to legalize.

Even if the court of appeals' construction of the 1967 Guidelines is accepted, however, standing alone they would be entitled to little, if any, weight, inasmuch as they conflict with the EEOC's earlier pronouncements and with the basic anti-discrimination philosophy of the Act. Cf. *General Electric* v. *Gilbert*, ... U.S. ...., 45 L.W. 4031, 4035-4037 (Dec. 7, 1976).

But, is it argued, by adding to the Civil Rights Act § 701(j), which incorporates a substantial part of the language of the 1967 Guidelines, Congress ratified those Guidelines. On that premise, the question presented is whether the 1972 Congress intended to prefer religious believers to other employees when their interests conflict, as when *someone* must unwillingly work on Saturday. We submit that Congress did not so intend.

Section 701(j) does not in terms support the Court of appeals' construction. This alone is decisive, for absent clear and unambiguous statutory language, it may not be assumed that Congress intended a result which 1) raises serious problems under the Establishment Clause; 2) is such a sharp departure from the equal treatment concept of discrimination in Title VII; and 3) would render § 701(j) a partial repeal of

§§ 703(h) and 703(j) which respectively preserve *bona fide* seniority systems and prohibit preferential treatment of any racial or religious group.

Nor does anything in the sparse legislative history of § 701(j) show that Sen. Randolph, its sponsor, or the other members of the 1972 Congress, understood it to enact a preference for one group of employees over another. Sen. Randolph certainly did not say that this is what he intended to accomplish. Indeed, there is no indication that Sen. Randolph intended that § 701(j) should give employees greater protection against private employers than they have against the government under the First Amendment, which he invoked.

The Conference Report gives no support to the court of appeals' interpretation of § 701(j). While the Report approved the 1967 Guidelines, it gives no indication as to what Congress thought that those Guidelines meant, let alone that they meant what the court of appeals in this case said they mean. The Report's reference to *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 325 (6 Cir., 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971), is ambiguous, for that decision assumed the validity of the regulation but nevertheless held for the employer. But if the decision is understood as intending to reverse the result in *Dewey,* it would still not justify the result reached by the court below in this case. For, in *Dewey,* the employer had refused even to determine whether there were other employees who would *willingly* substitute for the employee whose religious beliefs conflicted with his working on his Sabbath, although substitution was permissible under the collective bargaining contract as interpreted and administered in that case, 429 F.2d at

329. Disapproval of an interpretation of Title VII which does not even require that much accommodation does not imply approval of a requirement that unwilling employees be conscripted to work in favor of Sabbatarians.

II. As construed by the court below, Section 701(j) offends Establishment Clause aims in five respects: (1) it creates a discriminatory preference for religious over secular reasons for absence from work; (2) it facilitates religious activity for its own sake by removing non-discriminatory work barriers; (3) it taxes employers and employees to support religious practices of others by imposing upon them forfeiture of rights, expense and hardship; (4) it entangles employers, unions, a government agency and the courts in determination of religious questions; and (5) it divides the work force politically along religious lines. Moreover, it does all this without a secular purpose, which is the *sine qua non* of confronting Establishment Clause objections.

A secular purpose cannot be attributed to the Amendment as construed on the theory that it implements the Title VII guarantee against discrimination, for what it actually does is create a preference for religious observers to the detriment of non-observers and thereby discriminates *in favor of* religion. Nor can a secular purpose be divined on the theory that the Amendment promotes "free exercise values". As applied to the construction placed upon the Amendment by the court below, the premise underlying that theory necessarily is that "free exercise values" import an obligation on the part of others to assume burdens and expense, and to sacrifice their own contract rights and liberties, to facilitate religionists' observance. That premise cuts

against the grain of the most fundamental tenets of our jurisprudence.

Nor can it be argued that facilitation of religious observance is an "indirect," "remote" or "incidental," rather than the "primary," effect of the Amendment, for the face of the legislation as well as its history show that Congress' only purpose was to facilitate religious observance by Sabbatarians. Like a tax credit to parents who perform a religious duty by sending their children to parochial school, the "accommodation" requirement is but the means to the forbidden end—promotion of religious observance.

The Amendment cannot be defended by analogy to cases not involving religion—in which legislatures require employers to compensate employees for lost working time spent in voting and jury service in order to remove "a practical obstacle" to those activities. For promotion of voting and jury service are secular objectives which legislatures are at liberty to foster by any means which satisfy due process. In contrast, because of the Establishment Clause, government cannot affirmatively promote religious observance by even the most "reasonable" means. It is indisputable, we submit, that Government could not constitutionally require employers (or employees) to compensate Sabbatarians for wages lost because of their inability to work on Saturday. Requirement that employers incur expense and hardship, and that employees forfeit their own contract rights and privileges, by substituting for Sabbatarians on Saturday stands on no better ground.

Just as religious observance results in loss of wages for Saturday work, so does it result in disqualification for jobs which require availability for work on Saturday. Like the deprivation of earnings, the job dis-

qualification is voluntary—not imposed by law—and government is neither required nor allowed to compensate religious observers for either consequence at others' expense. Freedom to practice one's religion does not imply, and the Establishment Clause does not allow its extension to, insulation of religious practitioners against hardships and disqualifications which are indigenous to the religious practice itself. Thus, while the Free Exercise Clause guarantees the right of parents to send their children to parochial school, it does not require, and the Establishment Clause does not permit, government to remove the "practical obstacle": payment of both public school taxes and parochial school fees. Similarly, while the Free Exercise Clause guarantees Amish parents against compulsory high school education of their children, it cannot be thought to require, or the Establishment Clause to permit, government to compel employers to hire into jobs requiring a high school education Amish children who have been prevented from acquiring one by religious considerations. So too, while the Free Exercise Clause precludes denial of unemployment compensation to Sabbatarians because of their refusal to work on Saturday, it cannot be thought to require, nor can the Establishment Clause be construed to allow, government to compel employers to hire Sabbatarians into jobs which require employees to work on Saturdays.

The Establishment Clause cannot be evaded by the device of labelling failure to accommodate to religious practice "discrimination." For if job requirements or qualifications are in fact even-handed and relevant to job performance, their incompatibility with religious observance is the product of neutrality, not discrimination, and the accommodation requirement im-

poses discrimination *in favor of* religion in the guise of eliminating discrimination *against* it.

The Religion Clause cases support our position. None holds or implies that any law which compels others to sacrifice rights, interests or money to support or facilitate religious practices can be reconciled with the Establishment Clause.

ARGUMENT

I. TITLE VII NEED NOT AND SHOULD NOT BE CONSTRUED TO REQUIRE SACRIFICE OF SENIORITY AND OTHER EMPLOYEE RIGHTS TO FACILITATE RELIGIOUS OBSERVANCE

A. As Construed by the Court of Appeals, Title VII Would Require Hardison's Fellow Employees To Sacrifice Rights Guaranteed Them by Contract for the Sole Purpose of Facilitating His Observance of His Religious Practice

As we have noted (*supra*, p. 15), the court of appeals, finding that the district court's judgment in favor of the Union and the analysis on which that judgment was based, were "not directly challenged on appeal," (A. 263) declined specifically to review that judgment and affirmed it. We believe, however, and we now demonstrate, that examination of the court of appeals' analysis of TWA's obligations under the statute, on the basis of which the court reversed the district court's judgment for TWA, shows that the court necessarily, albeit implicitly, rejected the district court's analysis and conclusions concerning the Union's obligations as well.

The court concluded, in essence, that the record established the availability of "alternatives" which TWA might have, but did not, offer Hardison. These "alternatives," in the court's view, included permitting Hardison "to work a four-day week [,]" (A. 256)

and filling "Hardison's Sabbath shift from other available personnel [which] could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). Both of these "options," the court found, could have been accomplished "[w]ithin the framework of the collective bargaining agreement . . ." (A. 256). The fact is, however, as the record clearly demonstrates, that, with the exception of simply leaving Hardison's job unfilled, none of the "alternatives" proffered by the court of appeals could have been effected without violating or abridging contractual rights of other employees.

1. The first alternative proposed by the court of appeals would, in essence, have required TWA to operate its Saturday shift with either Hardison's slot or some other hourly or supervisory slot on the shift unfilled. The court held that TWA was required by the statute to endure the hardship caused by that short-handed shift, citing only two decisions of the EEOC in support of this proposition.[8] The burden of this

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[8] The cited decisons do not, in fact, support the proposition for which they are cited. Decision No. 70-580, 1973 CCH EEOC Decisions, ¶ 6120 explicitly follows the district court decision in *Dewey* v. *Reynolds Metals Co.*, 300 F. Supp. 709 (E.D. Mich., 1969), which was subsequently reversed. See 429 F.2d 325 (6th Cir., 1970), aff'd by an equally divided Court 402 U.S. 689 (1971). That EEOC decision does not, in any event, assert that an employer may be obliged, in the name of "reasonable accommodation," to operate with an unfilled job slot. The decision in No. 70-110, 1973 CCH EEOC Decisions ¶ 6062, found unlawful an employer rule which required, as a condition of working at overtime rates on Sunday, that an employee also work on Saturday, where employees were permitted to work on Saturday and skip Sunday without penalty. This decision thus requires only that Saturday worshippers be treated the same as Sunday worshippers.

option would, of course, fall entirely on the employer since, by definition, it would not require any other employee to work out-of-shift or out of schedule. It is, as we understand it, TWA's position that Title VII was not intended, and ought not be construed, to impose such a burden under the circumstances of this case, and we assume TWA will make that demonstration in its brief.

2. All of the other "options" which the court of appeals found available to TWA would, in fact, have implicated collectively-bargained rights and interests of Hardison's fellow employees. Thus "holding a worker over from the last shift [or] calling a worker in early" (A. 257-258) both would require scheduling, and paying for, overtime work at overtime rates.

Article VIII(a) of the applicable collective bargaining agreement requires payment at the rate of time and one-half the regular hourly rate "for all work performed in excess of eight (8) hours in any one day, [and] for all work performed either in advance of or after regularly scheduled hours . . ." (A. 216). As we understand it, TWA will argue that this additional cost of overtime pay is, *per se*, "undue hardship."

However, Article VIII(g) provides that "[e]xcept in an emergency, an employee will not be required to work overtime against his wishes" (A. 216). Inasmuch as a repeated, predictable absence from work of an employee regularly scheduled to work was not considered to be an "emergency" within the meaning of Article VIII (A. 128, 134-135), no unwilling employee could have been called in early or held over after his shift without violating his contractual right to refuse overtime work.

3. The court next identified the "more logical [ ]" alternative of "assigning a worker [to fill in for Hardison] from the pool of 200 employees qualified to do the work" (A. 258). This statement, and the court's assumption that this alternative was available "within the framework of the collective bargaining agreement" (A. 256), demonstrate a rather fundamental misunderstanding of the facts shown in the record.

The record basis for the court's assertion that there were 200 people available who could perform Hardison's work is the following exchange between the trial judge and Mr. Everett Kussmann (A. 133-134):

> The Court: Well, apart from the question of seniority, perhaps counsel wants to get—at least I would like to get to it—how many other people in the employ of TWA could perform his assigned duties.
>
> The Witness: Well, with limited instruction, any stores personnel we've got.
>
> The Court: I understand, but I am talking about assuming, if one can assume in this day, the [250] absence of any seniority at all, to perform the function, how many bodies would be available to perform this work.
>
> The Witness: In the grouping and not on the specific date?
>
> The Court: Yes, in the whole group.
>
> The Witness: Better than 200.
>
> The Court: 200 available other people that could perform this job, any one of whom without detriment to the company could trade his Saturday without hampering the operation of the company, this is assuming no restrictions on seniority, is that a fair statement?
>
> The Witness: That is a fair statement.

Quite contrary to the court's assertion, however, the colloquy makes perfectly clear that Kussmann's estimate assumed the hypothetical situation in which TWA was contractually free to move individual employees to different jobs, different shifts, and different schedules. The district judge obviously so understood it, and also understood that, in fact, TWA did not have that right.

In fact, of course, Hardison was the only man on his Saturday shift, out of a scheduled Progress Stores work force of 38 to 40 people (A. 133) assigned to his job. Thus, to cover that job from the 200 "available" people, TWA would have had to change another person's schedule, necessarily scheduling for Saturday work a person who otherwise would have had Saturday off. And since shift assignments and selection of days off were, under the contract, governed by seniority (A. 214), such rescheduling would have required violation of some employee's contractual rights. It was, indeed, precisely this realization which rendered Kussmann's March 6, 1969 attempt to solve Hardison's problem unproductive, as Hardison himself recognized at the time (A. 70-71, 83-84). It is therefore, in our view, beyond dispute that none of the options which the court of appeals found available to TWA "within the framework of the collective bargaining agreement" were, in fact, available, since all of them would have involved adjustments of schedules which had been assigned by seniority.

4. Finally, the thrust of the court's analysis is made absolutely clear by its treatment of a "third alternative" (A. 259). Here, fully recognizing that neither TWA nor the Union had any objection to Hardison's changing shifts or days off so long as the

change could be accomplished consistently with the collective bargaining agreement, the court suggests that more would be required of the Union. "It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act" (A. 260). The court thus explicitly, albeit in *dictum,* lays down the rule which is implicit in its earlier treatment of TWA's "alternatives": Title VII, says the court, compels the sacrifice of non-Sabbatarian employees' lawfully-acquired, honestly-held, highly-valued, collectively-bargained rights, where that sacrifice is required to enable their Sabbatarian colleagues to practice their religion. This interpretation, in the Union's view, finds no plausible support in either the legislative history or the judicial development of Title VII; it should therefore be rejected.

B. Title VII Does Not Require Sacrifice of Seniority and Other Employee Rights To Facilitate Religious Observance

1. As just shown, the question in this case is whether prohibition against discrimination on the basis of religion in Title VII requires that in order to allow an employee to avoid the adverse impact of a neutral employment rule on his practice of his religion, the rights which other employees have earned under a neutral seniority system must—or even may—be destroyed. We submit that this question must be answered in the negative, on both statutory and constitutional grounds. The Court of Appeals' affirmative answer is not supported by the language or the legislative history of Title VII either as it was enacted originally in 1964 or under the 1972 Amendments

which the Court of Appeals read back into the 1964 Act.

Moreover, for Congress to mandate a preference for one employee over others on the basis of the former's religious beliefs and practices would raise a substantial—and we submit insuperable—constitutional objection under the Establishment Clause of the First Amendment. Accordingly, there "comes into play [the canon of construction] that when a statute is ambiguous, 'construction should go in the direction of constitutional policy.' *United States* v. *Johnson,* 323 U.S. 273, 276 (1944)." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974). Thus, since "our 'task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations" (*id.,* quoting *CSC* v. *Letter Carriers,* 413 U.S. 548, 571, (1973)), the court of appeals' interpretation of Title VII should be rejected.

2. If a company requires the services of employees on Saturday, some of its employees will *have* to work that day. If that assignment is considered undesirable, the employer, or if the employees are represented by a union, the collective agreement, will have to state the method for determining who shall be required to fill that undesired assignment. In essence, the court of appeals held that Title VII of the Civil Rights Act of 1964, as amended, mandates assignment rules which require employees who are not Sabbatarians, against their will to perform all Saturday work and exempt all Sabbatarians from any such work. On this premise, rules which provide all employees an equal opportunity to avoid Saturday work—such as the seniority rule here—are labelled prohibited discrimination against

Sabbatarians. This paradoxical conception of Title VII discrimination is contrary to the basic purpose of that Act.

Section 703 of the Act, the provision that declares the statute's norms, prohibits *both* visiting adverse consequences on individuals "because of such individual's race, color, religion, sex or national origin" (§ 703(a) and (c)), *and* granting benefits to any individual "because of such individual's race, color, religion, sex or national origin" (§ 703(j)). The point of intersection of these two prohibitions is that "[d]iscriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (emphasis added). We can see no escape from the logic of the proposition that requiring individuals who do not espouse any religion, or a religion that does not regard Saturday as the Sabbath, to do undesired Saturday work, and excepting individuals who do espouse a Sabbatarian religion from that undesired work, is the very "discriminatory preference for * * * [a] minority * * * group" which § 703 in terms prohibits. And, so far as we are aware from our research, there is nothing in the 1964 legislative history to indicate that Congress specifically intended to require non-Sabbatarians to do undesired Saturday work which, under a religiously neutral rule, would otherwise be required of a Sabbatarian.

3. *Griggs* is the only Title VII decision in this Court cited by the court below. But, the reasoning and result in *Griggs* supports our view.

This Court there noted that "Congress directed the thrust of the Act to the *consequences* of employment

practices, not simply the motivation," and held that Title VII therefore prohibits non-job-related ability tests that are the product of "good intent, * * * that are [also] fair in form, but [are] discriminatory in operation." 401 U.S. at 431-432 (emphasis in original). Whatever the limits of *Griggs'* so-called "effects" test may eventually prove to be (see *General Electric Co.* v. *Gilbert*, — U.S. —, 45 L.W. 4031, 4034), the first limiting principle on the doctrine there announced is apparent from the decision itself. Consistent with Title VII's prohibition of both discrimination against and preferences for any group, *Griggs'* holding does not sanction an advantage for minorities because of their status as such, nor does it impose a detriment on the majority *qua* majority. The very point of *Griggs* is that all job seekers are to be provided what is *in fact* an *equal* opportunity in job competition and not an opportunity skewed in favor of the majority where that "consequence would appear to be directly traceable to race" (*id.*, at 430). To underline this limitation, the Court emphasized that "the Act does not command that any person be hired simply because * * * he is a member of a minority group." *Id.*, at 430-431.

Thus, *Griggs* recognizes that job allocation rules that do, in fact, provide majorities and minorities the *same* chance to secure the benefit both seek is what the Act requires, whereas rules that provide majorities or minorities, because of their status as such, a *superior* chance to prevail in the competition, is what the Act *prohibits*. Here, of course, the Court of Appeals did not conclude that Sabbatarians were denied an equal opportunity to avoid Saturday work; rather, it read Title VII to mandate rules that exempt Sabbatarians

from all Saturday work and require only non-Sabbatarians to work on Saturday. It thereby deprived senior non-Sabbatarians of the right they earned by their past labor to choose whether or not they wish to work on Saturday.

Nothing in *Griggs* suggested or implied that minorities should be exempted from legitimate job requirements or qualifications that the employer even-handedly exacts of all employees regardless of their race, color, sex, religion, or national origin. Nor does anything in *Griggs* require that white applicants for employment be subjected to a more stringent test for determining their qualifications than black applicants, or suggest that a test culturally biased against whites or in favor of blacks be given. *Griggs'* holding that the *effect* of facially neutral employment tests may prove them discriminatory does not look to the contrary, for "discrimination" is defined as composed of two elements: (1) "artificial, arbitrary and unnecessary barriers to employment"; (2) which "operate invidiously to discriminate on the basis of racial or other impermissible classification" (*id* at 431). The Court in *Griggs* said "Congress did not intend by Title VII * * * to guarantee a job to every person regardless of qualifications." 401 U.S. at 430. It quoted proponents of Title VII as follows, *id.* at 434:

> "the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong. Rec. 7247." (Emphasis in original.)

And the Court concluded, *id.*, at 436:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."

Neutral tests,[9] which "measure the person for the job" (*id.* at 436), in terms relevant to legitimate job requirements and qualifications are not discriminatory under

[9] While we do not understand the respondent to controvert the religious neutrality of the seniority system, out of an abundance of caution we pause to demonstrate the accuracy of our characterization. The essence of the "seniority principles * * * increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) and to compute noncompetitive benefits earned under the contract of employment ('benefit' seniority)" is that time in service with the employer computed from the "company date of hire", or the "departmental date of hire" or an alternate beginning point, is the determinant of, or a factor in, allocation decisions and benefit computations. (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766-767.) If, as in *Franks*, departmental seniority is used, so long as the seniority rules are themselves neutral and are applied according to their terms, every employee, without regard to race, color, religion, sex or national origin, receives full and equal credit for every day worked in that department. And, the system provides that allocation decisions are made in favor of the individual with the most credits, and that benefit decisions are also directly related to the credits accumulated. Company seniority systems follow the same pattern, except that a different "hiring" date is utilized in making the computations. Thus, so far as we are able to understand, it is impossible to conceive of such a seniority system that produces results that are congruent with any variable other than the neutral factor of time worked in the particular department, company, *etc.*

To be sure, as this Court recognized in ***Franks,*** where a seniority system applies, if the employer discriminates in ***hire*** (or

that standard regardless how adversely they impact on minorities versus majorities.

It is, we submit, indisputable, that for jobs which require Saturday work of employees, availability for Saturday work is a legitimate job qualification, and that there must be a system which allocates Saturday off. It is equally plain that the seniority system here provides a neutral means of deciding who shall work Saturday and who shall not that comports with Title VII, even though Sabbatarians are disadvantaged because of their self-imposed inability to work on Saturday. Indeed, to exempt Sabbatarians from that work requirement is to ignore the lesson of *Griggs* that the statutory prohibition against discrimination forbids giving any advantage to any individual "because of

assignment or discharge), a potential consequence is that the victims of that discrimination will be adversely affected in that they "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to [the] benefits [allocated according to seniority] his inferiors." (*Id.* at 768.) But, since this adverse effect is the direct product of the hiring system and is therefore confined to the individuals that the particular employer has actually discriminated against in hire, as opposed to minority persons and women generally whom that employer has not discriminated against and who are therefore in their "rightful place in the hierarchy of seniority" (*id.*), the Court also recognized that the "underlying legal wrong affecting them is *not* the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." (*Id.* at 758; emphasis added.) And the ultimate point of *Franks* is that individuals who are the victims of a "racially discriminatory hiring system" (or a racially discriminatory discharge system) who in a timely fashion directly challenge that legal wrong are also assured their "rightful" place in the seniority system. *Id.* at 762-770.

Here, of course, there is no allegation that TWA discriminated against Hardison, in hire or assignment, and, indeed, no claim at all that he was not in his rightful place in the seniority system.

such individual's race, color, religion, sex or national origin."

4. The court of appeals interpreted § 703 of the 1964 Act as requiring TWA to give preference to Hardison's desire not to work on Saturday over the desire of senior employees whose motivation was not religious on the basis of 1967 EEOC Guidelines interpreting the 1964 Act which the court deemed to have been approved by the 1972 Congress in adding § 701(j) to the Act. The court of appeals misunderstood both the Guidelines and what Congress did in 1972.

We submit that the court erred, *first,* because the Guidelines themselves do not in terms justify the result it reached, and *second,* because there is in any event no indication that in enacting § 701(j) the 1972 Congress understood the Guidelines to require a preference among employees for those motivated by religious considerations, or intended so sharply to depart from the basic anti-discrimination philosophy of Title VII and from Congress' own historic neutrality with respect to religion. On the contrary, the 1972 legislative history confirms what appears from the language of § 701(j) and the Guidelines, namely, that Congress intended a far narrower, and constitutionally more defensible, result: to declare a rule of decision for cases such as *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971), where an equally divided Court had affirmed a court of appeals decision holding that the Act did not require an employer to *attempt* to find a willing replacement for an employee who objected, for religious reasons, to work on a particular day.

(a) The Equal Employment Opportunity Commission first issued Religious Discrimination Guidelines

on June 15, 1966.[10] The Commission there expressed the view that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees . . . ." The Commission did not then believe, however, that that duty would prevent an employer from establishing "a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees . . . ."[11] By way of illustrating what it conceived to be the impact of these Guidelines on specific situations, the Commission, in paragraph (b), offered the following examples, among others: "(1) An employer *may permit* absences from work on religious holidays . . . but must treat all religions with substantial uniformity in this respect. . . . (4) where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer *should attempt to achieve an accommodation* so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of *serious inconvenience* to the conduct of his business or *disproportionate allocation of unfavorable work assignments to other employees* (emphasis added)."[12]

It thus seems clear that, in 1966, the Commission did not believe that Congress had intended to require ex-

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[10] 31 F.R. 8370. *See* CCH Employment Practices Guide ¶ 3970, n. 1.

[11] CCH Employment Practices Guide § 3970, n. 1.

[12] *Id.*

tension of unequal, preferential, treatment to religious practitioners. Employers, to be sure, were obliged to be particularly sensitive to the religious needs of their employees; they were not, however, required to create special schedules, let alone burden their other employees, in order to "accommodate" religious practices.

The 1966 Guidelines were replaced on July 10, 1967.[13] It will be well to have before us their operative text in full:

> "(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer to make reasonable accommodations* to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> "(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).[14] (Emphasis added.)

[13] 32 F.R. 10298; 29 C.F.R. § 1605.1.

[14] Subparagraph (a) states the issue involved in the Guidelines, namely, the refusal to work for religious reasons.

It will at once be seen that there is nothing in the terms of the Guidelines which requires that a preference be given to any employee over any other employee. Nor do the Guidelines assert that any *employee* must accommodate himself to the religious needs of other employees. Only "the employer" is obligated to make reasonable accommodations. The Guidelines do not suggest that the draftsmen foresaw or confronted the problem of compulsory accommodation *by employees,* independently, or as a consequence of compulsory accommodation by the employer.

Nor is the court of appeals' construction of the 1967 Guidelines supported by comparison with the predecessor, from which the 1967 version differs in three noteworthy respects: *first,* the 1966 version required the employer to accommodate if that could be done "without serious inconvenience to the conduct of the business[,]" [15] while the current version requires accommodation where it can be made "without undue hardship." [16] *Second,* the current Guidelines place upon the employer the burden of proving that "undue hardship" would result from any proposed accommodation.[17] *Third,* all the illustrative examples contained in paragraph (b) of the 1966 Guidelines were deleted.

These changes cannot be understood, singly or in combination, as converting the 1966 instruction that a "disproportionate allocation of unfavorable work assignments to other employees" is not required into a demand for disproportionate allocation wherever necessary to accommodate an employee's religious obliga-

[15] CCH Employment Practices Guide ¶ 3970, n. 1.

[16] 29 C.F.R. § 1605.1.

[17] *Id.*

tions. At most, the revised Guidelines withdrew the prior resolution of the problem, leaving it to future disposition on a case-by-case basis, ¶ (d).[18] The difference between "serious inconvenience" and "undue hardship" may, and doubtless was intended to, connote a difference in degree, whereby the obligation to accommodate would be imposed on employers in a larger number of cases. However, the change in standard does not even suggest that a preference *among employees* was contemplated.

Further, while shifting the burden of proof to the employer doubtless would also change the outcome in some cases (cf. *Armstrong* v. *Manzo,* 380 U.S. 545, 551 (1965)), the Guidelines say nothing about what kinds or classes of conduct are lawful and unlawful; specifically, whether preference of some employees over others is required. Finally, elimination of the illustrative example respecting the impact on other employees cannot lead to any inference, because the 1967 Guidelines eliminated *all* the illustrative examples in the 1966 Guidelines. To reason that dropping an illustration equals adopting the opposite rule would make no sense at all, because that would mean that under the 1967 Guidelines "[a]n employer may [not] permit absences from work on religious holidays * * *". Compare 1966 Guidelines b(1), quoted above.

For the foregoing reasons, the court of appeals was in error in believing that the 1967 Guidelines give guidance as to how this case is to be decided.

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[18] Of course, since the 1964 Act deliberately left enforcement to the courts, this promise to "review each case on an individual basis" meant only that the Commission would determine in "each case" whether to issue a right-to-sue letter or what informal, non-binding, advice it would give to those who solicited it.

(b) But even if the court of appeals' construction of the 1967 Guidelines is accepted, that would not lead to a decision in plaintiff's favor on the issue of construction of the 1964 Act. As to that, the question would remain as to what effect should be given the 1967 Guidelines in construing the 1964 Act. It is plain enough that, but for succeeding events, these Guidelines would be entitled to little if any weight. The analysis would be identical to that in part III of the recent opinion in *General Electric* v. *Gilbert,* — U.S. —, 45 L.W., 4031, 4035-4037 (Dec. 7, 1976). For, if they mean what the court of appeals held that they mean, the 1967 Guidelines "conflicted with earlier pronouncements of the Agency" (*id.* at 4036), namely the 1966 Guidelines, and therefore do "not receive high marks when judged by the standards enunciated in *Skidmore* [v. *Swift & Co.,* 323 U.S. 134, 140 (1944)]" (*id.*). And, on the same assumption, the 1967 Guidelines are, as in *Gilbert,* at sharp variance with the basic anti-discrimination philosophy of the Act. Standing alone, therefore, the 1967 Guidelines, however construed, cannot support the decision below.

(c) But, of course, the 1967 Guidelines do not stand alone, since Congress, in 1972, added to the Civil Rights Act § 701(j), which incorporates a substantial part of the language of the 1967 Guideline. Implicit in the court of appeals' reliance on § 701(j) is the proposition that Congress thereby ratified the 1967 Guidelines "with positive legislation", cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381-382 (1969). On that premise, the question presented is whether the 1972 Congress intended to prefer religious believers to other employees when their interests conflict, as when *someone* must unwillingly work on Saturday.

The question, admittedly, is a closer one than that under the 1964 Act alone, but once again the sounder conclusion by far is that Congress did not intend so radical a departure from the original "discrimination" concept.

What has already been said of the 1967 Guidelines suffices to show that the similar language of § 701(j) does not declare that in choosing who among his employees will be required involuntarily to perform necessary work on Saturday an employer must exclude Sabbatarians and impose that burden only on others. Yet, the requirement of such a preference would have to appear unambiguously if the court of appeals' interpretation were to be adopted, given the substantial constitutional issues raised by that construction, see p. 30 *supra*. As Mr. Chief Justice Hughes wrote, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932), quoted in *e.g., United States* v. *Rumely,* 345 U.S. 41, 45 (1953), and *Machinists* v. *Street,* 367 U.S. 740, 749 (1961), where First Amendment issues were avoided.

The absence of any—much less a clear—indication that a preference to one group of employees over another was intended is highly significant also because in its absence the inference is compelling that Congress did not intend to abandon the equal treatment concept of discrimination in Title VII, see pp. 31-35, *supra.*

Moreover, the court of appeals' construction of Section 701(j) necessitates reading into Section 701(j) a

partial repeal of the Section 703(h) preservation of *bona fide* seniority systems and of the Section 703(j) prohibition against preferential treatment. Yet there is not the slightest hint anywhere in the history of Section 701(j) that Congress even thought about, much less purposefully intended, to dilute in any way the protections contained in those two sections. The important role those two sections play in the overall scheme of Title VII, and the complete absence of any evidence suggesting an intent to repeal them, make this "a prototypical case where an adjudication of repeal by implication is not appropriate." *Morton* v. *Mancari,* 417 U.S. 535, 550 (1974).

Nothing in the sparse legislative history of § 701(j) would have caused the members of the 1972 Congress to believe that they were enacting a preference for one group of employees over another. Senator Randolph, the sponsor of § 701(j), in presenting the Amendment to his colleagues, described it as follows:[19]

> Mr. Randolph: . . . [I]n presenting this proposal . . . it is my desire . . . to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law . . .
>
> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices

[19] The Amendment which became Section 701(j) was not in the bills reported out from Committee in either house. It was added to the Senate bill (S. 2515) on the floor and accepted by the House as part of the final Conference Committee report. The history thus consists almost entirely of the brief debate in the Senate preceding adoption of the Amendment by that body.

rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention. . . .

I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments . . . .

The amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved . . . .

After only brief debate the amendment was unanimously adopted by the Senate, and thereafter accepted

by the Conference Committee and the House. The section-by-section analysis of the Conference Report states, regarding Section 701(j), that "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 325 (6th Cir. 1970), affirmed by an equally divided court, 402 U.S. 689 (1971)."[20] *Dewey* was the decision to which Senator Randolph alluded when he spoke of "resolv[ing] by legislation . . . that which the courts apparently have not resolved."

But there is no reason to assume that he intended § 701(j) to protect "freedom to act" at the expense of competing rights and interests of others. The Senator's reference to the obligations of the Federal Government as an employer strengthens the inference that he was embracing First Amendment law rather than giving conduct greater protection than it would have against Government under the Constitution.[21] There is no indication that Senator Randolph or his colleagues believed that Freedom of Religion embraces a right to preferential treatment for religious practitioners, or that the Establishment Clause permits Congress to enact such a preference. Thus, § 701(j) is properly read as giving *some* protection to employees acting on their religious beliefs, but not as specifying the circumstances under which the right to act must yield. With respect to that issue, the only guidance § 701(j) pro-

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[20] 118 Cong. Rec. 7167 (March 3, 1972).

[21] To the same effect are Senator Randolph's statements that it was his desire to "assure . . . freedom from religious discrimination" and "to resolve [the problem of religious discrimination] in a way I think was originally intended by the Civil Rights Act".

vides is that "unreasonable" accommodation is not required.

The description of § 701(j) in the Conference Report confirms our understanding of its limited reach. It will not be gainsaid that the Report approved the 1967 Guidelines, but it gives no indication as to what Congress thought that those Guidelines meant, let alone that they meant what the court of appeals in this case said they mean. Nor does the citation of the *Dewey* case support the court of appeals' construction. To begin with, it is by no means clear that the Report intended to reverse the result reached by the court of appeals in *Dewey*. For, while the 1967 Guidelines were "challenged" in that case the court of appeals assumed their validity and nonetheless decided the case in favor of the defendant company. Thus, the authorization to the EEOC to establish Guidelines such as those challenged in *Dewey* does not even dictate what result would follow under those Guidelines if another case identical to *Dewey* were to arise.

Moreover, even if the Conference Report could be read as disapproving the result in *Dewey*, that would not require judgment in favor of Hardison. For in *Dewey* the plaintiff had available, and had repeatedly used, a contractual right to arrange his own voluntary replacements for his Sabbath shifts. It was only when he refused any longer to arrange for his own replacements that he was terminated, an action which the court of appeals held his employer had a right to take. *Dewey*, 429 F.2d at 329. Thus, in the context of *Dewey*, the intended purpose of the Amendment becomes clear. For there the employer could have assumed the presumably *de minimis* burden of finding and scheduling Mr. Dewey's Sabbath replacement.

In that case, no rights of other employees would have been implicated by a substitution, for the collective bargaining agreement in that case, as construed, permitted it. *Id.* Yet, a majority of the court of appeals in *Dewey* effectively held that the employer did not have *that* obligation.

The Randolph Amendment, then, would serve a significant purpose if construed to impose on Reynolds Metal and other employers similarly situated a legal obligation to seek a voluntary substitute for Sabbatarians such as Dewey. That would have the effect, where accommodation would not violate any rights of others, of placing the "burden * * * on the employer and not the employee asking for an accommodation to seek out the cooperation of other employees * * *. *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 5 (D. Ore. 1973). It would require an attempt to arrange voluntary transfers of days, shifts or jobs, where such transfers would solve the religious practitioner's problem, provided that such transfers would not conflict with rights or obligations imposed under non-discriminatory collective bargaining agreements or seniority policies. *See* A. 208-209.

In general, § 701(j) can thus be construed to require *some* attempt to facilitate a religious practitioner's efforts to avoid conflicts between his work and his religion, provided it does not require preferential, discriminatory, treatment of such employees at their colleagues' and employers' expense. For, in addition to being irreconcilably at war with the balance of Title VII and devoid of convincing legislative historic support, the latter construction would, as we now demonstrate, violate the Establishment Clause of the First Amendment.

II. CONSTRUING THE ACCOMMODATION REQUIREMENT AS OVERRIDING NEUTRAL SENIORITY RIGHTS AND LEGITIMATE WORK AND JOB INTERESTS WOULD CREATE CONFLICT WITH THE ESTABLISHMENT CLAUSE

A. Broadly Construed, the Accommodation Requirement Is in Inescapable Conflict with Rights and Interests of Others.

Decisions of this Court make it clear, and it appears to be common ground,[22] that to survive Establishment Clause challenge, the "accommodation" requirement, as construed below, at the least must have a secular purpose. *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975). The only such purpose which has been suggested is promotion of "free exercise values." But the premise necessarily implicit in that suggestion is that "free exercise values" include an obligation on the part of others to assume burdens and expense, and to sacrifice their own contract rights and liberties, to facilitate their fellows' religious exercises. Because that premise is patently false, and for other reasons elaborated hereafter, the requirement as construed below cannot be reconciled with the Establishment Clause.

The court below construed § 701(j) to mean that if seniority rights and other valid provisions of a collective bargaining agreement prevent "accommodation" of religious practices the agreement must give way (A. 256-260). We have shown, pp. 25-28, *supra,* that Hardison's demand for Saturdays off could not have been accommodated without trenching upon rights guaranteed all bargaining unit employees by the collective agreement (1) to bid for shift assignments and days off on the basis of seniority (A. 214), (2) to refuse overtime work unless required by an "emergency" (A. 216).

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[22] But see p. 78, n. 47, *infra.*

"Accommodation" is similarly prevented in many (but see pp. 46-47, *supra*), establishments where the "competitive status seniority" provisions of a collective bargaining agreement govern, *inter alia,* "rest days [and] shift assignments" (*Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 766 (1976)); (A. 225); *Johnson* v. *U.S. Postal Service,* 497 F.2d 128, 129 (5 Cir., 1974) ("Accommodation" required "forcing men senior to [plaintiff] to work on Saturday"); *Dawson* v. *Mizell,* 325 F. Supp. 511, 512, 514 (E.D. Va. 1971) ("assignment * * * of the plaintiff to a position resulting in his having Saturdays off would be violative of the spirit as well as the substance of the agreement under which Post Office employees work. * * * [T]he seniority rights contained in the agreement are of the utmost importance to the employees.").

This Court said in *Franks, supra,* at 766: "Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) * * *." As Mr. Justice Powell put it, "*competitive* type seniority * * * determines an employee's preferential rights to various economic advantages at the expense of other employees" (*id.,* at 787, concurring in part and dissenting in part; emphasis in original). Thus, if the Randolph Amendment is construed to require contracting employers and unions to force seniors to work on Saturday or Sunday to "accommodate" religious practices of juniors, the Court is confronted with a "collision" between the "freedom asserted by [Hardison and other religionists and] rights asserted by . . . other[s] * * *." *Braunfeld* v. *Brown,* 366 U.S. 599, 604 (1961), quoting *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 630 (1943). In that collision, the demand to "accommodate" can hardly survive.

B. Facilitation of Religious Practice at the Expense of Others Produces Evils Against Which the Establishment Clause Is Aimed.

In *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 772 (1973), this Court said:

> "What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers *any of the evils against which that Clause protects.*" (Emphasis added.) [23]

Five of those evils are furthered by the challenged construction. As detailed below, these are: (1) discriminatory preference of religious over secular reasons for absence from work; (2) facilitation of religious activity for its own sake, by removal of non-discriminatory work-barriers; (3) taxation to support religious activity by imposing forfeiture of rights, expense and hardship upon others; (4) entanglement of employers, unions, a government agency and the courts in determination of religious questions; and (5) division of the work force politically along religious lines.

(1) Breach of Neutrality by Discriminatory Preference of Religious Causes.

The Establishment Clause prohibits government preference of religious over secular causes. "The Court has enforced a scrupulous neutrality by the

[23] As the italicized phrase indicates, the Court has recognized that "the now well-defined three part test" (*id.*) first enunciated in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971), is not entirely comprehensive but is particularly applicable in evaluating "the constitutionality of statutes affording state aid to church-related schools." *Roemer* v. *Board of Public Works of Maryland,* 44 L.W. 4939, 4943 (1976).

[government] * * * as between religious and other activities * * *." *Roemer, supra,* 44 L.W. at 4942. Government cannot "constitutionally pass laws or impose requirements which aid all religions [or religious practices] as against non-believers." *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). By singling out religious practices for compulsory accommodation, leaving all secular reasons for absence, no matter how worthy, unprotected, Section 701(j) "imposes a priority of the religious over the secular" (p. 12, *supra*); it "mandates discrimination in favor of religion against non-religion." [24] As Judge Celebrezze put it in *Cummins* v. *Parker Seal Co.,* 516 F.2d 533, 558 (6 Cir., 1975), aff'd by an equally divided Court, 45 L.W. 4009 (Nov. 2, 1976):

> "Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection."

Discrimination in favor of religious and against non-religious interests and activities is the antithesis of neutrality.

(2) Promotion of Religious Activity for Its Own Sake

Imposition of the "accommodation" requirement violates government's obligation to "confine itself to

[24] *Can the Government Require Accommodation of Religion at the Private Job Site?,* 62 Va. L. Rev. 237, 253, 257 (1976).

secular objectives, and neither advance nor impede religious activity" (*Roemer, supra,* at 4943). Both elements are violated. In the first place, there is no secular objective. The only such objective claimed by its supporters[25] is implementation of the elimination of discrimination on one of the grounds Congress declared "irrelevant" to "job qualifications". *Griggs,* 401 U.S. at 436. But, as demonstrated herein, inasmuch as religious *practice* (as distinguished from religious *belief*) *is* relevant to non-discriminatory job qualifications, *i.e.,* availability for work when needed, the "accommodation" requirement does not merely implement the protection of religion against discrimination; instead, it elevates religious practice to a preferred position. Indeed, it subordinates job requirements to conflicting religious requirements. As Judge Celebrezze said in *Cummins,* 516 F.2d at 556:

> "Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than 'putting teeth' into the Act, it mandates religious discrimination, thus departing from the Act's basic purpose."

Discriminatory facilitation of religious observance at the expense of non-discriminatory job requirements cannot be said to have a secular objective.

Furthermore, facilitation by removal of relevant non-discriminatory barriers is a "direct and substantial advancement of religion". *Nyquist, supra,* 413 U.S. n. 39, at 785; *Meek, supra,* 421 U.S. at 366. Facilitation being the patent and avowed object,[26] that is inevitably its "primary effect" (*Roemer, supra,* at 4944). With all deference to the courts below, it cannot reasonably be argued that the "primary effect is to guarantee job security" (A. 202, 264-265); that guarantee is not an "effect" but the *method* of facilitating religious observance. Like a tax credit to parents who perform a religious duty by sending their children to a parochial school, the accommodation requirement is but the means to an end—facilitation of religious practice. Since promotion of religious observance *is the end,* its forseeable attainment cannot be dismissed as an "indirect," "remote" or "incidental" effect. *Nyquist, supra,* 413 U.S. at 771; *Roemer, supra,* 44 L.W. at 4942.

[25] (A. 264-265); *Cummins,* 516 F.2d at 552.

(3) Taxation of Others To Support Religious Practices.

Although not a tax in form, the accommodation requirement is a tax in effect and consequently violates the prohibition against taxation to support religious observance. Thus, insofar as accommodation is held to require defeasance of seniority or other valuable contract rights, or conscription of, or payment of overtime to, substitutes for religious practitioners, property rights and even liberty are taken by force of law to benefit religious observance. That is the most egregious of establishment evils; one against which the Clause was initially directed. The preamble to Thomas Jefferson's Bill for Establishing Religious Freedom

[26] Senator Randolph explicitly stated that the object was to facilitate Sabbatarian religious practice and observance, 118 Cong. Rec. 705-706 (1972), pp. 43-44 *supra,* and the EEOC Guidelines, 29 C.F.R. § 1605.1, state no other object.

declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson* v. *Board of Education,* 330 U.S. 1, 13 (1947). That principle obviously applies as well to involuntary contributions of property or services as to "money" and as much to observance of religious practices as to the propagation of religious "opinions". Indeed, the enactment predicated upon the preamble declaration broadly guarantees that "no man shall be compelled to * * * support any religious worship * * * ."[27] *Id., Nyquist, supra,* 413 U.S., n. 28, at 771. The prohibition is absolute: "[n]o tax in any amount, large or small, can be levied to support any religious activities * * * " (*Meek, supra,* 421 U.S. at 359; *Nyquist, supra,* 413 U.S. at 780); government "was stripped of all power to tax, to support, or otherwise to assist any or all religions * * * ." *Everson, supra,* 330 U.S. at 11.[28]

(4) Involvement in Religious Judgments.

The accommodation requirement violates the prohibition against "entanglement" in the classic sense. It is true that under § 701(j) government does not itself distinguish, in the first instance, between what is a religious practice which must be accommodated and

[27] The preamble condemns not only requiring a man to support religious practices of others of which he disapproves, but requiring him to support his own religion or religious practices which he approves. Such compulsion "is depriving him of the comfortable liberty of" making voluntarily such contributions as he chooses to make. *Id.;* see also Mr. Justice Rutledge's dissenting opinion in *Everson,* 330 U.S. at 36-41, 44, n. 38, 45-46.

[28] *Cf.* Mr. Justice Rutledge's dissent, *id.,* at 33: "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree."

what is not. It delegates that function to the employer (and, on the assumption that unions are also subject to the duty to "accommodate"), to the exclusive bargaining representative of all the employees. On them devolves the practical task of judging whether the practice for which the employee demands "accommodation" is the product of a religious belief which is "truly held." *Gillette* v. *United States,* 401 U.S. 437, 457 (1971). That necessarily involves two inquiries. One, whether the particular practice is "truly" a feature of the religion the claimant professes; two, whether the profession is itself "sincere." *Id.* As this Court said in *Gillette,* "we must * * * recognize that 'sincerity' is a concept that can bear only so much adjudicative weight." *Id.* And "the dangers of erratic decision making" (*id.* at 458), are compounded by the endless variety of practices which may be asserted as religious, and hence requiring accommodation.[29]

The dangers are further compounded by the fact that the employer and the union are not experts in the adjudication of such claims, and are perhaps disqualified by conflict of interest from passing upon them impartially. *Cf. Humphrey* v. *Moore,* 375 U.S. 335,

[29] The nature of the questions which may require decision is illustrated in *Williams* v. *Southern Union Gas Co.,* 529 F.2d 483, 485, 488 (10 Cir., 1976), *cert. denied* 45 L.W. 3363, where the employee's claim was that under his religion "he, rather than his employer, had the exclusive right to determine just what constituted an emergency." If, as appears, that was truly a "feature" of the employee's religion, the employer would trench upon § 701(j) if his judgment as to the existence of an "emergency" differed from that of the employee. Under the statute, the employer could then prevail only by proving "undue hardship."

349-350 (1964).[30] Yet to disqualify them would mean that even the most fraudulent demands for accommodation would have to be honored. *Cf. Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963).

If "accommodation" is refused, as Judge Celebrezze said in *Cummins,* 516 F.2d at 559:

> "Disposition of complaints under the [1972] amendment will require inquiry [by EEOC and the courts] into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters."

The contrast between the complex and difficult nature of these judgments and the "[o]ccasional audits" characterized in *Roemer,* 44 L.W. at 4948, as "quick and nonjudgmental," could not be sharper.

(5) Political Division of the Work Force on Religious Lines

As construed below, the accommodation requirement "carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Nyquist, supra,* 413 U.S. at 794:

> The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid To Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U.S. at 622. *Id.* at 796, n. 54.

[30] As the district court noted in this case (A. 187-188), under plaintiff's construction of the Randolph Amendment, unions would have "the duty to ignore their contract" (A. 189) in favor of any member of the bargaining unit upon his or her demand. Such a duty would be in square conflict with the union's own duty to defend and enforce the contract on behalf of all members of the bargaining unit. *Vaca* v. *Sipes,* 386 U.S. 171 (1967). Given that conflict, the union is hardly in a position to evaluate impartially the merits of an exemption claim.

Here, as in *Nyquist,* "the potential [of the accommodation requirement] for seriously divisive political consequences needs no elaboration." *Id.* at 797. Given the importance of comparative seniority, *Franks, supra,* resentment of senior employees against forfeiture of dearly won day-off and shift preference rights to accommodate the religious convictions or practices of juniors is inevitable. As the Sixth Circuit found in *Reid* v. *Memphis Publishing Company,* 521 F.2d 512, 516-517 (1975), *cert. denied,* 45 L.W. 3364:

> "Copyreaders having seniority usually do not want to work on Saturday. * * *
>
> "The Editor was of the opinion that to hire Reid, with all Saturdays off, would create a serious morale problem among the other nine copyreaders who would have seniority over Reid, but who, nevertheless, would be involuntarily assigned to take his place for Saturday work. The copyreaders could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated against and were being penalized because they did not hold the same religious beliefs as Reid."

Whatever secular reasons a senior may have for opting for Saturdays off: whether it be shopping at

stores which are closed on Sunday, watching his son play football on the high school team or attending Saturday matinees at the theater, they satisfy him. Can anything but deep resentment be provoked by a governmental edict which weighs his junior's religious needs more heavily than his own secular ones and compels him to yield his liberty to their observance? And that resentment inevitably divides the work force politically along religious lines between the beneficiaries and the victims of the edict. Its repeal or retention becomes a political issue in the work place and, inevitably, in the Nation.

> "To have * * * [the labor force] divide on the issue * * * of [subordination of seniority rights to religious observance] would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections." *Lemon* v. *Kurtzman,* 403 U.S. 602, 622-623 (1971).

C. Free Exercise Values Do Not Entail, and Establishment Clause Values Forbid, Imposition of Hardships Upon or Conscription of Rights of Others To Facilitate Religious Practices.

The vulnerability of the Randolph Amendment under the Establishment Clause has been conceded by Leo Pfeffer, one of the Nation's leading Religion Clauses scholars and advocates, who filed a brief in support of the Amendment broadly construed in *Parker Seal Company* v. *Cummins,* No. 75-478, 45 L.W. 4009.[31] In *God, Caesar and the Constitution*

[31] Brief of the Synagogue Council of America and National Jewish Community Relations Advisory Council, *amici curiae.*

(Beacon Press, Boston, 1975), at 335, Mr. Pfeffer said:

> "Even in the absence of any 'undue hardship', the constitutionality of the amendment is not entirely beyond question. It is one thing for Congress to say that an applicant may not be denied a job in private industry merely because he is a Jew (or Negro or Puerto Rican); it is another thing to say that the employer must inconvenience himself or his business or suffer a hardship less than 'undue' so that the Jew can observe his own religion."

In other words, it is "fundamental error * * * [to] equate religious discrimination with failure to accomodate." *Dewey* v. *Reynolds Metal Company,* 429 F.2d 324, 335 (6 Cir., 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971).

Mr. Pfeffer goes on to state (*id.*) that "[s]upport for upholding the constitutionality of the law may perhaps be found in two cases not involving religion," one sustaining the constitutionality of a statute forbidding employers to deduct wages for four hours absence for voting on election day;[32] the other sustaining the constitutionality of a statute requiring employers to make whole employees who serve on juries the difference between their jury pay and their regular wages.[33] Mr. Pfeffer perceives the distinction between these cases and

> "one involving a privately employed Sabbatarian who refuses to work on Saturdays, [to be that] in the former cases the community as a whole benefits when workers vote and serve on juries,

[32] *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421 (1952).

[33] *Dean* v. *Gadsden Times Publishing Corp.,* 412 U.S. 543 (1973).

whereas in the latter case only the Sabbatarian is benefited. Yet the Supreme Court's recent liberality in Free Exercise cases may well induce it to uphold the 1972 amendment of the Civil Rights Act, as consistent with the spirit if not the letter of the laws involved in the *Day-Brite* and *Dean* cases." (*Id.*)

The necessity for resort to cases "not involving religion" is a glaring admission that the religion cases do not support the Amendment. Moreover, the suggested distinction is misleading; properly analyzed, the analogy cuts quite the other way. The operative difference is that voting and jury service are secular objectives within the power of the legislature to promote by any means which satisfy due process; in contrast, government cannot affirmatively promote religious observance by even the most "reasonable" means. The vice lies not in the fact that "only the Sabbatarian is benefited"—that would be true of a law which prohibited employment discrimination (in the classic motive sense) against Sabbatarians—it lies instead in conflict with the aims of the Establishment Clause which inheres in treating "a practical obstacle" to religious observance as the constitutional equivalent of "a practical obstacle to getting out the vote." *Day-Brite, supra,* 342 U.S. at 424-425, *Dean, supra,* 412 U.S. at 544.

Application to religious observance of the remedy prescribed by the legislatures to minimize practical deterrents to voting and jury service highlight the inconsistency with the Establishment Clause. Due process considerations aside, could Congress, consistently with the Establishment Clause, require an employer to compensate Sabbatarians at overtime or regular rates

of pay for time spent in Sabbath observance, as if it were time spent voting or serving on juries? Refraining from work on Saturday is costly to the Sabbatarian and that cost is undoubtedly a deterrent to Sabbath observance. If Congress, consistently with the Establishment Clause, could decide that "time out" for religious observance, like "time out for voting should cost the employee nothing" (*id.*), it would be free to impose on the employer, or, for that matter, upon his fellow workers who earn an overtime premium by working on Saturday when he makes nothing, the burden of compensating the Sabbatarian for his loss. Could it rationally be suggested that such a requirement can coexist with the prohibition against taxation to support religious observance?[34] That it cannot is, we submit, decisive against broad construction of the Randolph Amendment. It is not the *extent* of the burden imposed upon rights or property of others, but imposition *per se* on others of *any* burden to remove "practical obstacles" to religious observance, which the Establishment Clause condemns:

> "to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson* * * * 'Not the amount but "the principle of assessment was wrong.'"

[34] Inapposite due process analysis similarly marks the Brief for the United States and the Equal Employment Commission as *amici curiae* in *Cummins*. The argument (pp. 25-31) is that the accommodation requirement is "reasonable" inasmuch as the exemption for "undue hardship" lifts the obligation where religious practices affect work performance "substantially." However, as we have seen, the issue is not whether the balance struck between promoting religious observance and competing business and labor rights and interests is "reasonable," but on whether religious observance by some can constitutionally be promoted at the expense of others, even though the amount of the exaction is not "unreasonable."

330 U.S. at 40-41 (quoting from Madison's Memorial and Remonstrance)." *Nyquist, supra,* 413 U.S. at 797, n. 56.

(1) DISQUALIFICATION RESULTING FROM RELIGIOUS PRACTICES AT ODDS WITH NON-DISCRIMINATORY WORK REQUIREMENTS IS SELF-IMPOSED, NOT AN EFFECT OF DISCRIMINATION

It is argued, however, that Establishment Clause objections are overcome because the removal of "practical obstacles" is necessary to protect Free Exercise. The assumption underlying this argument is that the constitutional right freely to practice one's religion (*Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304 (1940)), imports a correlative obligation of others to accept such burdens and make such sacrifices as the practice may impose on them.[35] That assumption goes against the grain of the most fundamental tenets of our jurisprudence.[36] It has been explicitly rejected in the series

[35] That the "principle of religious liberty" is limited to practices which do not "interfere [ ] with the rights of others" is initially recognized (albeit later disregarded) in the Brief of the Synagogue Council of America, etc., as *amici curiae* in *Cummins,* pp. 4-5. The Brief for the United States, etc. as *amici curiae* in *Cummins,* p. 36, would apparently restrict impermissible interference with the rights of others to their "religious liberties." Neither reason nor authority affords any support for this opportunistic perversion of principle.

[36] An identical fallacy underlies conclusions drawn from the unexceptionable premise that "[e]mployees should be educated to respect the conscientious beliefs of their fellow-workers—just as they must learn to accept co-employees regardless of race or national origin * * *." COLPA Brief *amicus curiae* in *Cummins,* p. 22. Respect for religious beliefs simply does not encompass willingness to sacrifice one's own rights and liberties to facilitate another's religious practices. Therefore, compulsion of sacrifice cannot be passed off as promotion of respect.

of cases in which Seventh Day Adventists and others demanded exemption from union shop dues obligations imposed by contract on all employees on the theory that since their religious convictions forbade them to pay dues to a union, their discharge for conscientious refusal interfered with their religious liberty.[37] In the earliest of these cases, *Otten, supra,* 205 F.2d at 61, Judge Learned Hand, speaking for the court, said:

> "The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insisit that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens,* no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world."

[37] *Otten* v. *Baltimore & O. R. Co.,* 205 F.2d 58 (2d Cir. 1953); *Linscott* v. *Millers Falls Co.,* 440 F.2d 14 (1st Cir. 1971), *cert. denied,* 404 U.S. 872 (1971); *Gray* v. *Gulf, Mobile & Ohio R.R. Co.,* 429 F.2d 1064 (5th Cir. 1970); *Wicks* v. *Southern Pacific Co.,* 231 F.2d 130 (9th Cir. 1956), *cert. denied,* 351 U.S. 946 (1956); *Yott* v. *North American Rockwell Corporation,* 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Papermakers & Paperworkers Union,* 462 F.2d 174 (6th Cir., 1972), *cert. denied,* 409 U.S. 1028 (1972).

The essence of that insight is that "hardships" and "practical obstacles" resulting from religious practices are consequences of voluntarism; they are natural, not artificial, barriers to free exercise. Freedom does not imply insulation from hardships which are indigenous to religious practice.[38] Election of poor parents to send their children to parochial school is an example. While the Free Exercise Clause guarantees that option, it does not, and cannot, touch the "hard-

[38] Professor Freund has written:

> "Nor is there any general principle that requires the state to compensate those who out of religious conviction incur a handicap *under law*. Pupils in public schools may (perhaps must) be excused on their religious holidays; but it scarcely follows that those pupils are not responsible for the work they miss, even if they must resort to the expense of private tutoring. Businesses that close on Saturday as a religious observance and must close on Sunday under the law are disadvantaged materially because of religious faith; but exemption from the Sunday laws is not required. The state requires a certain formal ceremony to render a marriage valid in law, and provides magistrates at public expense who are available to satisfy this requirement. For those couples, however, whose religious faith compels them to hold an ecclesiastical ceremony, additional expense is involved, either to the couple or to their church or both. Must the state therefore compensate the minister or the bridegroom and bride? Would it help their case to insist that no true marriage can be celebrated without churchly blessing and that a ceremony before a judge is anti-religious, a profanation subsized with public money? Would not the answer be: If your religion prevents you from availing yourself of the public facility and impels you to make a financial sacrifice for the sake of your faith, surely the spirit of religion is the better served by your act." *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1687 (1969). (Emphasis added.)

A fortiori, is there no principle requiring compensation for handicaps resulting not from state imposed requirements but from competing interests of others. Encroachment upon such interests to promote free exercise is precisely what the Establishment Clause forbids.

ship" or "practical obstacle": payment of both public school taxes and parochial school fees. *Everson,* 330 U.S. at 18 (Jackson, J., dissenting); 58-59 (Rutledge, J., dissenting); *Nyquist,* 413 U.S. at 778-789; *Braunfeld* v. *Brown,* 366 U.S. at 606. Similarly, the Free Exercise Clause guarantees Amish parents against compulsory high school education of their children. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). But that does not imply that Amish children who for religious reasons do not receive a high school education may or must be considered qualified for, or hired into, government or private jobs requiring high school mathematics. To do so would not only impair those legitimate interests of the enterprise the requirement serves, but discriminate in favor of Amish applicants against others who lack high school mathematics. For the same reasons, while the Free Exercise Clause precludes denial of unemployment compensation to Sabbatarians because of their refusal of Saturday work, it cannot reasonably be argued that their freedom compels government or private employers to hire Sabbatarians for jobs requiring Saturday work, or in which the privilege of Saturdays or Sundays off is allocated by contract or by policy to the senior bidder. In sum, conscientious compulsion to observe religious practices may disqualify the practitioner from employment under neutral job-related principles and policies of legitimate interest to a government or private enterprise or its employees. Such principles and policies do not "operate invidiously to discriminate on the basis of * * * impermissible" criteria, *Griggs, supra,* 401 U.S. at 429, 431, and, consequently, removal of resultant disqualification is neither an incident nor a corollary of free exercise.

Inasmuch as the freedom guaranteed by the Free Exercise Clause does not encompass conscription of others to the religious observer's convenience, it does not[39] require government *qua* employer, at the expense of rights and interests of its other employees, discriminatorily to prefer religious observance over all other meritorious reasons for absence, or discriminatorily to excuse non-compliance with neutral, work-related, job policies, qualifications and requirements, to facilitate religious practices. The Government's defense of the position of the United States Postal Service as employer in the *Johnson* and *Mizell* cases, *supra,* and by implication, its *amicus* brief in *Cummins,* establish that this is also the Government's position. Of course, if the Free Exercise Clause bound government as employer so to discriminate, we would not contend that Congress is powerless to extend the same obligation to the private sector.

(2) THE ESTABLISHMENT CLAUSE DOES NOT ALLOW GOVERNMENT SPECIALLY TO PRIVILEGE RELIGIOUS OBSERVANCE UNDER THE GUISE OF COMBATTING DISCRIMINATION

It is argued, however, that even if such protection is not guaranteed by the Free Exercise Clause itself, Congress can provide it in the interest of promoting "free exercise values." The thesis is that government is entitled to protect religious observance and practices against "discrimination"; that "discrimination" as conceived in Title VII includes practices which are "discriminatory" in operation or effect, as well as those which are discriminatorily motivated; and that, therefore, government is entitled to define as "discriminatory" practices or requirements which conflict with religious observance unless the religious observance cannot be accommodated without "undue hardship." (Brief for the United States. etc., in *Cummins,* pp. 25-31.)

[39] Contrary to the position taken in the Brief for Seventh-Day Adventist Church as *amicus curiae* in *Cummins,* pp. 4, 5, 8.

Analytically, the difficulty with this approach is that it labels "discriminatory" job policies and requirements which are in fact neutral and work-related, merely because they affect workers and applicants who meet them differently from those who do not. Establishment Clause objections aside, that misnomer is vulnerable, both because it creates an "irrebutable presumption * * * contrary to fact", *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973), and because it transfers from the disqualification inherent in the religious practice to the non-discriminatory work-related rule or policy the onus of adverse "effect".

This is illustrated in the Government's *amicus* brief in *Cummins* (p. 27):

> "The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his jub duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship."

But the reason discharge in the cited case "would not constitute discrimination" is not the impossibility of accommodating the religious observance to the employment relationship; it is that the requirement that work be performed is itself not "discriminatory"—inasmuch as "an employee who refuses to work at all because his religious beliefs forbid it" is treated no differently than an employee who refuses to work at all because he is lazy. The operative fact in both cases is the refusal to work, not the reason for it. Similarly, the "effect" of neutral work requirements and their enforcement by discharge, however hard on religious observers who fail to qualify, is not, and cannot be presumed to be, "discriminatory"[40] merely because non-observers do qualify. With respect to this neutral job qualification, observers and non-observers are differently, not similarly, situated.

The "concept of discrimination has traditionally meant" (*General Electric Co.* v. *Gilbert*, — U.S. —, 45 L.W. 4031, 4037), dissimilar treatment of those similarly situated or similar treatment of those differently situated. *Richardson* v. *Belcher*, 404 U.S. 78, 83 (1971); *Johnson* v. *Robinson*, 415 U.S. 361, 374-375, 383 (1974); *Fronterio* v. *Richardson*, 411 U.S. 677, 683 (1973). In some contexts, it has also meant favorable or adverse action taken on a prohibited ground or grounds. *Black's Law Dictionary* (Fourth Ed.), p. 553.[41] To define discrimination as failure to "accommodate" to persons differently situated in a relevant respect is a contradiction in terms; it brands nondiscrimination, discrimination.

[40] *U. S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 513-514 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 446-449 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971).

[41] Because of the wide variety of applications, the term has not received "a uniform interpretation." See *Gilbert*, *supra*, 45 L.W. at 4041, n. 1 (Mr. Justice Stevens, dissenting). In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948), therein referred to, the term is used in the sense defined first above; in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) it is first used in that sense (at 32) and then in the second defined sense (at 33-34). We placed the term in the context of Title VII, *supra*, at pp. 31-36.

Plainly, susceptibility to accommodation without "undue hardship" of religious practices that "would interfere to some degree with the normal performance of job duties" is "a criterion wholly unrelated to" (*Vlandis supra*, 412 U.S. at 449) ascertaining "discrimination", unless the same degree of interference is treated differently when it is the result of religious practice than other causes. And, for the same reason, a rule which requires employees to work on Saturdays or Sundays cannot be branded "discriminatory in effect" as against Sabbatarians or Sunday worshippers, unless others who refuse for secular reasons to work on either of those days are exempt.

Thus, the Establishment Clause cannot be evaded by the device of labelling failure to accommodate to religious practices "discrimination." For if job requirements or qualifications are in fact even handed and relevant to job performance their incompatibility with religious observance is the product of neutrality, not discrimination, and the accommodation requirement imposes discrimination *in favor of* religion under the guise of eliminating discrimination *against* it.

This is not to say, as the Government's brief in *Cummins* would have it (Br. *op. cit. supra*, p. 27), that

refusal to accommodate to even the "most insignificant interference with job performance", such as an employee's religious need to "interrupt his work once or twice a day for a few moments of prayer or meditation" may never be considered discriminatory. It may indeed, if similar "momentary disruptions" by others, for other reasons, is tolerated, or if the consequences of momentary interruptions are really insignificant, for then refusals to accommodate may be considered a pretext, rather than the real reason, for the discharge.[42] But if a religious observance or practice *does* "interfere to some degree with the normal performance of * * * job duties," or with the allocation of benefits and burdens among employees in accordance with neutral principles such as seniority, it *does* have "a manifest relationship to the employment in question"; it cannot be labelled "irrelevant"; and the

[42] Thus, in *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F.Supp. 1276, 1278 (E.D. La. 1969), the unrefuted testimony of the plaintiff showed that she was fired by her foreman for not working after sundown on Fridays on the supposed authority of the plant superintendent—who had previously told her he did not think her taking off early would be a problem. In *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 5 & n. 8 (D. Ore. 1973), the employer "could have accommodated Claybaugh as it accommodated other employees [for secular] activities." Again, in *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 944 (M.D. Ala. 1974), "an extraordinarily strong case of discrimination," positions suitable for the aggrieved plaintiff, where "his religious practices would be no burden to the defendant or its work," were filled instead by new or recalled employees. Finally, in *Weitkenaut* v. *Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1286 (D. Vt. 1974), the employer refused to excuse the plaintiff one Friday night a month—although the employee was willing to take a job transfer and to arrange for willing and available substitutes, and the employer had previously adjusted the work schedules of others for both religious and non-religious reasons.

resultant barrier does *not* "operate invidiously to discriminate" (*Griggs* v. *Duke Power Co.*, 401 U.S. at 431), on the basis of religion. Indeed, barriers to employment flowing from *such* religious practices cannot reasonably be characterized as "artificial, arbitrary [or] unnecessary" (*id.* at 431), and refusal to "accommodate" to them cannot logically be branded "discriminatory." See pp. 33-34, *supra*.

Tension analogous to the Religious Clauses' between prohibited discrimination and prohibited support exists under the National Labor Relations Act, which, in Section 8(1) illegalizes employer discrimination against labor organizations and in Section 8(2) illegalizes employer support of labor organizations. In *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949), the Board found that the Company had discriminatorily denied the Union use of the only available meeting hall in a Company town, which had been given freely to others. To remedy the unfair labor practice, the Board ordered the Company, without qualification, simply to permit unions to use the hall upon request. The Court noted that "Sections 8(1) and 8(2) of the Act would seem to run into each other in the situation before us" (336 U.S. at 231). It resolved the dilemma by confining the decree to "discrimination", which it defined as causing "a union's application to be treated on a different basis than those of others similarly situated" (336 U.S. at 233). The Court said that an order which found "discrimination" in "mere denial of facilities", however harshly such denial might impinge on union organizational activity, simply "does not mean what it says" and implied that such an order would run afoul of the "support" prohibition.

The analogy to this case is virtually perfect. To label mere failure to accommodate to religious practices discriminatory is to support religion, not to outlaw discrimination.

D. The Religion Clause Cases Support Our Position

Nothing in the Religion Clause decisions is inconsistent with this analysis. For the most part, they involve government regulation aimed at secular objectives which affect religious institutions or religious observance only incidentally. In the nature of things, exemption of religious practices or property from general regulation may raise no more problems than inclusion. In these situations, as *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) teaches, neither Free Exercise nor Establishment Clause aims may emerge entirely unscathed. Deep historical roots explain some apparent deviations (*id.,* at 672-673). But one thread emerges clearly from the cases: governmental compulsion discriminatorily to favor or oppose religion is prohibited absolutely. Until now, as Mr. Pfeffer apparently recognized, pp. 58-60, *supra,* no law so violative of that principle as the Randolph Amendment had even been presented for approval by this Court.

In *Zorach* v *Clauson,* 343 U.S. 306 (1952), the released time program did not involve coercion (343 U.S. at 311, n. 7 and accompanying text), and did not discriminatorily benefit religion, for the majority of the Court assumed that no hardship or burden was imposed upon those who opted against release by the absence of their fellows.[43]

[43] The majority refused to indulge Mr. Justice Jackson's speculation in dissent (343 U.S. at 324) that the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church going absentees." The majority defined the parameters of its holding as follows (at 314): The school "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the Court held that inclusion of unemployed Sabbatarians in the class of those denied unemployment compensation because voluntarily unavailable for work amounted to punishment for refusing "to violate a cardinal principle of * * religious faith" and therefore impaired Free Exercise. 374 U.S. at 406. The rationale is implicit in the purpose of the denial of benefits: to induce or coerce unemployed persons to take available jobs. When jobs require Saturday work, the effect of that policy is to induce or coerce the religious practitioner to violate his religion; to withhold benefits because of his refusal "penalizes the free exercise of * * * constitutional liberties" (*id.*). The Court highlighted its finding that the denial in *Sherbert was* a penalty for religious observance by demonstrating that similar disqualification was *not* imposed upon Sunday worshippers (*id.*).

But jobs which require work on Saturday, Sunday, or Friday, and neutral rules and policies which allocate days off and shift preferences in accordance with seniority, are not designed to influence or affect employee conduct. The dilemma with which their existence confronts the Sabbatarian, the Sunday worshipper and the Mohammedan alike, *i.e.,* abandoning a precept of their religion or relinquishing the job, is of the employees' *own* making. Exclusion from the job is not "punishment" for refusal to succumb to any govern-

ment policy; it is the consequence of incompatability between religious observance and qualification for the job. The very incompatibility which disqualifies the religious observer makes the job unavailable to him. What posed the forbidden dilemma in *Sherbert* was that the State treated jobs as available to Sabbatarians despite their religious disqualification to take them. 374 U.S., n. 7, at 407-408.

In view of the majority's conclusion that inclusion of Sabbatarians in the disqualified class[44] constituted punishment violative of Free Exercise, to have considered that exclusion, because it benefited Sabbatarians alone, violative of the Establishment Clause, would have totally paralyzed decision. Accordingly, resolution necessarily turned on whether exemption breached "the governmental obligation of neutrality" (*id.* at 409) in other ways. On this point it was decisive that the appellees did not show or even argue that exemption of Sabbatarians would adversely affect rights, benefits or property of others.[45] Finally, while, in the majority view, non-exemption in *Sherbert*

[44] The majority found that the disqualified class included some but not all "personal reasons", other than religious observance, for unavailability for work. *Id.* at 401, n. 4. It followed that the inclusion of Sabbatarians reflected a value judgment as to the religious justification for refusing to work on Saturday.

[45] This is emphasized by the Court's observation (374 U.S. at 407), that

> appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.

The Court treated this as a possible justification for encroachment upon Free Exercise, not as an Establishment Clause objection, and declined to consider it "because no such objection appears to have been made before the South Carolina Supreme Court" (*id.*).

would have impermissibly infringed Free Exercise, absence of the Randolph Amendments' "accommodation" requirement would not impair Free Exercise in government employment, let alone private employment, p. 66, *supra*. Hence, in this case, unlike *Sherbert*, there is no obstacle to full effectuation of Establishment Clause values.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause was breached by State compulsion of Amish parents to submit their children to high school education. Exemption was found not to offend the Establishment Clause because, 406 U.S. at 234, n. 22:

> "The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory education law would impose."

Here, again, the clash was between a secular objective of the State and the survival of a religion, not between claimed religious rights and conflicting asserted secular rights or privileges of others. None (except perhaps the Amish children themselves) was injured by their non-attendance at high school, and, of course, as we have seen, Wisconsin did not attempt to impose on others any burden resulting from their religious-based educational deficiency.

In *McGowan* v. *Maryland*, 366 U.S. 420 (1961) and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), compulsory Sunday closing laws were upheld against both Free

Exercise and Establishment Clause objections because the majority found that "their effect was * * * to promote the legitimate [secular] interest in a universal day of rest and recreation and * * * that they had only a remote and incidental effect advantageous to religious institutions. [366 U.S.] at 450" *Nyquist, supra,* 413 U.S. n. 39 at 784; *Braunfeld, supra,* 366 U.S. at 607.

It is argued that the implication in *Braunfeld, id.* at 608, that the State could have "cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday," supports the accommodation requirement because it recognizes the propriety of elimination for religious observers of "economic disadvantages imposed by the present system." But the flaw in that argument is that the "system" which resulted in "economic disadvantages" to Sabbatarians in *Braunfeld* was imposed *by law,* however remote, indirect and incidental to the law's objective the effect on Sabbatarians may have been. While the Free Exercise Clause may not command (*Nyquist, supra,* 413 U.S. at 788), the Establishment Clause does not forbid, removal of economic disadvantages created or imposed *by law* any more than it prohibits exemption of religious institutions and property from taxes levied on profitmaking institutions. In this sense and in this context only it is true that, as the Chief Justice stated for the Court in *Walz* v. *Tax Commission,* 397 U.S. 664, 673 (1970):

> "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."

Of course, the Randolph Amendment cannot be justified on the theory that it is designed to remove economic hardships imposed *by law* on religious practitioners in general or on Sabbatarians in particular. There are, of course, no laws which, in purpose or effect, single out religious practices for adverse treatment, and hence the special treatment—accommodation—mandated for all religious practices by the Randolph Amendment cannot be designed to mitigate the effect of any such laws. Nor does the Amendment operate to overcome any general legal handicap by which Sabbatarians, as distinguished from Sunday observers, are burdened. The Amendment applies as much to industries which operate on a seven day or on a six day as a five day basis and as much in states without as with a Sunday Closing Law.[46] Thus the economic disadvantages of which the Amendment would relieve religious practitioners result not from law but from the clash between the constraints of religious observance and job requirements or policies which are not discriminatory in purpose or in effect.

Finally, in *Gillette* v. *United States,* 401 U.S. 437, 450-455 (1971), the Court held consistent with the Establishment Clause draft exemption for conscientious objectors whose objection was grounded in religi-

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[46] As stated in the *Amicus* Brief for the Synagogue Council, etc. in *Cummins,* p. 12, Section 701 (j)

> "applies to Sunday-observing Christians employed by a Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week."

It

> "benefits, for example, the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who keeps his business open seven days a week." *Id.,* at 14.

ous conviction. But it did so on the theory that the object and effect of the law was to respect "supremacy of conscience," which the majority held to be a "neutral and secular" basis of distinction "in the sense of the Establishment Clause." It followed that the adverse impact of the exemption of objectors who qualified upon non-objectors and on objectors who did not was not a result of discrimination on the basis of religion. The premise underlying the entire opinion is that if the Court had found that religious observance was the basis of distinction between those who were exempted and those who were not, both the benefit to religious objectors and the resulting detriment to the non-exempt class would have condemned the legislation on Establishment Clause grounds.

Furthermore, in *Gillette*, as in *Sherbert, Yoder, McGowan*, and *Braunfeld*, there was ground to argue that failure to exempt conscientious objectors would violate the Free Exercise Clause, for the restraints flowed from government regulation—the draft—rather than from non-discriminatory circumstances and conditions which Government did not create.[47]

[47] The suggestion of COLPA in its brief *amicus curiae* in *Cummins*, pp. 11-16, that a law which "assist[s] religious believers" should not be held to violate the Establishment Clause if it goes no further than to promote "free exercise values" would eliminate the "tension" between the Free Exercise Clause and the Establishment Clause by removing the restraints which are the latter's "aims", pp. 50-58, *supra*. That approach finds no support in the dissenting opinion of Mr. Justice White in *Welsh* v. *United States*, 398 U.S. 333, 367 (1970), on which it purportedly rests. Indeed, his opinion stresses that protection of "free exercise values" may soften the impact of the Establishment Clause only where Congress elects to relieve "religious believers from the burdens of [a] law" which not merely prohibits but "commands" actions "forbidden by a man's religion." *Id.* at 373. That is to adhere to, not reject, the view that promotion of free exercise values does not authorize relief from "practical obstacles" to religious observance which *are not* imposed by *law*, and which neither prohibit nor compel action by the religious observer.

For this reason, likewise, these cases lend no support to a law that requires "the employer * * * [to] inconvenience himself or his business or suffer a hardship less than "undue' so that the Jew can observe his own religion." Pfeffer, *supra*, p. 59.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with direction to dismiss the complaint.

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